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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91228195
Party	Plaintiff Disney Enterprises, Inc.
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Date	09/06/2016
Attachments	Reply in Support of Motion to Strike Answer and Enter Default.pdf(308657 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DISNEY ENTERPRISES, INC., Opposer v. FREESTYLE RECORDS INC, Applicant.	Opposition No.: 91228195 Mark: MULAN V BEAUTY Serial No.: 86683349 Filed: July 5, 2015

OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE APPLICANT'S ANSWER & ENTER DEFAULT JUDGMENT

Opposer Disney Enterprises, Inc. ("Opposer") submits this Reply Brief in support of its Motion to Strike Applicant Freestyle Records Inc's ("Applicant") Answer and request that the Board enter default judgment against Applicant under Fed. R. Civ. P. 55 or, in the alternative, to issue an order deeming all allegations in the Notice of Opposition admitted.

Rather than take the opportunity in its opposition brief to illustrate what "good faith" basis Applicant had at the time of answering to justify a general denial, Applicant instead chooses to "re-state[ ] by reference" its improper pleading. Worse, Applicant baselessly admonishes Opposer for using "red herring procedural tactics/arguments," (Opp. Br. at ¶6), to hold Applicant accountable to the pleading standards set forth by the Board and Federal Rules. Indeed, Applicant's Answer—as affirmed by Applicant's opposition brief—does not provide fair notice to Opposer of which allegations are genuinely in dispute and would require the parties to waste resources conducting potentially unnecessary discovery. Accordingly, for the following reasons, including

those set forth in Opposer's Motion, Opposer's Motion to Strike should be granted.[1]

I. APPLICANT DOES NOT HAVE A GOOD FAITH BASIS FOR RELYING ON A GENERAL DENIAL

Under the Federal Rules of Civil Procedure, which the Board adopts, general denials are ordinarily improper because there is usually something in the complaint—such as allegations of jurisdictional grounds—which should be admitted. *Daily v. Fed. Ins. Co.*, 2005 WL 1108978, at *6 (N.D. Cal. Apr. 5, 2005). For that reason, as one prominent commentator has noted, the use of general denials "has been sharply restricted" under the Federal Rules of Civil Procedure and "an answer consisting of a general denial will be available to a party acting in good faith only in the most exceptional cases." *Wright & Miller*, Federal Practice and Procedure: Civil 2d § 1265; *see also* 2 Moore's Federal Practice, § 8.06[4] (3d ed.) ("Because of the very broad nature of a general denial, as well as the duty to respond in good faith after reasonable inquiry, general denials are rarely appropriate responses to multi-faceted statements within claims for relief when numerous facts are alleged together.")

General denials are not appropriate simply because an applicant "disagrees" with an opposition's allegations, (See Opp. Br. at ¶3), or where an Opposer "la[ys] out all of the good faith reasons and the truth as to why [the Board] should deny [the Opposition]" (Id. at ¶4.) Rather, a general denial such as that offered by Applicant, is permissible only in the rare instance where a party "intends in good faith to deny *all* the allegations of a pleading." Fed. R. Civ. P. 8(b)(3) (emphasis added). In this instance,

[1] To the extent the Board is inclined to construe Applicant's opposition as indicative of Applicant's intent to defend this Opposition proceeding and not enter default judgment, Opposer respectfully requests that, at minimum, Applicant be ordered to amend its Answer to specifically admit or deny each of Opposer's allegations. *See, e.g.,* Fed. R. Civ. P. 8(b)(2) (denials set forth in an answer "must fairly respond to the substance of the allegation."); TBMP § 311.02(a) (applicant "should state, as to each of the allegations contained in the complaint, that the allegation is either admitted or denied.").

Applicant fails to offer *any* good faith basis for generally denying Opposer's allegations. Indeed, among other allegations, Opposer pleads allegations relating to Applicant's *own* business address (as stated in the opposed application), as well as general foundational facts culled directly from the subject application itself, including the application's publication date and the fact that Applicant is identified as the listed owner. (See, Dkt. 1 at ¶¶ 8-10.) Because these allegations cannot be reasonably or in good faith denied, Applicant cannot (under Rule 11) rely upon a "general denial" and must instead fairly respond to the substance of Opposer's allegations. Fed. R. Civ. P. 8(b)(2); TBMP § 311.02(a) ("If the complaint consists of numbered paragraphs setting forth the basis of plaintiff's claim of damage, the defendant's admissions or denials should be made in numbered paragraphs corresponding to the numbered paragraphs in the complaint.").

II. APPLICANT CONCEDES THAT ITS "ANSWER" CONTAINS AN IMPERMISSIBLE ATTACK ON THE MERITS OF OPPOSER'S CLAIMS

Apart from its general denial, Applicant's answer should be stricken because it contains numerous paragraphs of impertinent statements and arguments on the merits of Opposer's claims. (See Br. at 4-5.) Applicant's opposition brief concedes as much, confirming that "[t]he Answer laid out all of the good faith reasons and the truth as to why the [Board] should deny the Mark Opposition – and instead order that the Application of the Mark be granted." (Opp. Br. at ¶4.) Because a "defendant should not argue the merits of the allegations in a complaint," Applicant's answer should be stricken for this reason alone, as more fully set forth in Opposer's Motion. (Br. at 4-5); *see* TBMP § 311.02(a). In the alternative, Applicant should be ordered to specifically admit or deny each allegations. TBMP § 311.02(a).

III. APPLICANT IMPROPERLY REQUESTS THE BOARD TO "FIND" AFFIRMATIVE DEFENSES WITHIN APPLICANT'S ANSWER

Applicant did not plead any affirmative defenses in its answer, yet asks that "to the extent any of the language [i.e. argument] in the Answer should be construed as an affirmation [sic] defense, . . . that the Board please do so." (Opp. Br. at ¶8.) Applicant's request should be rejected, as it is Applicant's burden (not the Board's) to place Opposer on fair notice of any defenses Applicant may have by specifically pleading such defenses. *See H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720 (TTAB 2008) (the reason for requiring an affirmative defense to be pleaded is to give the plaintiff notice of the defense and an opportunity to respond); *Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (primary purpose of pleadings "is to give fair notice of the claims or defenses asserted"); *IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009) (claim or defense must be specific enough to provide fair notice to adverse party); *see also* TBMP § 311.02(b); TBMP § 506.01 ("The primary purpose of pleadings . . . is to give fair notice of the claims or defenses asserted.").

IV. CONCLUSION

For the reasons and authorities discussed above, including those set forth at length in Opposer's Motion, Opposer respectfully requests that the Board grant Opposer's Motion to Strike Applicant's Answer & Enter Default Judgment. In the event the Board is not inclined to enter default judgment, Applicant should be ordered to specifically admit or deny each of Opposer's allegations, as required under the Federal Rules.

Respectfully Submitted,

Dated: September 6, 2016

By:/Linda K. McLeod/

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by first class mail, postage prepaid, on September 6, 2016, upon Applicant at the address below:

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